SUPREME COURT, U. S.

FILED

FEB 1 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DeFUNIS, *et al.*,

Petitioners,

—v.—

CHARLES ODEGAARD, President of the University of Washington, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE NATIONAL CONFERENCE OF BLACK LAWYERS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

DERRICK A. BELL, JR.
Harvard Law School
Cambridge, Mass. 02138
Attorney for Amicus Curiae

Of Counsel:
LENNOX S. HINDS
National Director,
National Conference
of Black Lawyers
126 West 119th Street
New York, N.Y. 10027

HAYWOOD BURNS
University of New York at Buffalo
School of Law
Buffalo, N.Y. 14202

INDEX

PAGE

Interest of the Amicus 1

Consent to Filing 2

Opinions Below 3

Question Presented 3

Statement of the Case 3

Summary of Argument 6

Argument 7

The respondent law school's minority-admissions policy is a constitutionally appropriate effort to remedy the effects of long-standing racial discrimination in the legal profession.

I. Some consideration of race is necessary to remedy disadvantages imposed because of race . 8

II. A judicial finding of racial discrimination is not a condition precedent to adoption of a valid minority admissions program 10

III. Respondents' minority admissions plan is not rendered invalid because it alters expectations rooted in societal patterns that perpetuate racial inequality 11

IV. The historic exclusion of racial minorities from the legal profession justified respondents' affirmative efforts to attract qualified minority applicants 17

Table of Authorities

Cases: PAGE

Alabama v. United States, 371 U.S. 37 (1962) 15

Allen v. Asheville City Board of Education, 434 F.2d 902 (4th Cir. 1970) 13

Anderson v. San Francisco Unified School District, 357 F. Supp. 248 (N.D. Cal. 1972) 13

Associated General Contractors of Massachusetts, Inc. v. Altshuler, ___ F.2d ___, 42 U.S.L.W. 2320 (Dec. 25, 1973) 17

Baker v Columbus Municipal Separate School District, 462 F. 2d 1112 (5th Cir. 1972) 15

Briggs v. Elliott, 132 F. Supp. 776 (E.D. S.C. 1955) 8

Brown v. Board of Education, 347 U.S. 483 (1954) 3,8,17,18

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) 9

Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972) 15

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 16

Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971) 9

Dandridge v. Williams, 397 U.S. 471 (1970) 16

Deal v. Cincinnati Board of Education, 369 F.2d 55, 61 (6th Cir. 1966) 10

DeFunis v. Odegaard, 82 Wn. 2d 11, 32-33, 507 P.2d 1169, 1182 (1973) 20,23

Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) 18

PAGE

Florida ex rel. Hawkins v. Board of Control, 350 U.S. 413 (1956) 21

Gaston County v. United States, 395 U.S. 285 (1969) . 9,15
Green v. County School Board of New Kent County, 391 U.S. 430 (1968) 8
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 9,15
Guinn v. United States, 238 U.S. 347 (1915) 15

Hobson v. Hansen, 269 F. Supp. 401, 476-88 (D. D.C. 1967) 15
Hunt v. Arnold, 172 F. Supp. 847 (N.D. Ga. 1959) 15

Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189, 217 (1973) 12

Lee v. Nyquist, 318 F. Supp. 710 (W.D. N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) 10
Local 53, Intern. Assoc. of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) 16
Local 189, United Papermakers and Paperworkers, AFL-CIO v. United States, 416 F.2d 980 (5th Cir. 1969) 12
Louisiana v. United States, 380 U.S. 145 (1965) 15

Mancari v. Morton, 359 F. Supp. 585 (D. N.Mex. 1973) . 11
McLaughlin v. Florida, 379 U.S. 184, 192 (1964) 7
Meredith v. Fair, 305 F.2d 343, 351-354 (5th Cir. 1962) . 15
Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) 21
North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) 10
Northcross v. Board of Education of Memphis, 466 F.2d 890, 898 (6th Cir. 1972). 12

PAGE

Norwalk CORE v. Norwalk Board of Education, 423 F.2d 121 (2d Cir. 1970) 13
Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931-32 (2d Cir. 1968) 9

Offerman v. Nitkowski, 378 F.2d 22 (2d. Cir. 1967) . . . 10
Otero v. New York City Housing Authority, __F.2d__, 42 U.S.L.W. 2185 (Oct. 9, 1973) 14

Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970) 10

San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278, 1301-02 (1973) 16
Schnell v. Davis, 336 U.S. 933 (1949) 15
Simmons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966) 10
Sipeul v. Bd. of Regents of Univ. of Oklahoma, 332 U.S. 631 (1948) 21
Springfield School Comm. v. Barksdale, 348 F.2d 261, 266 (1st Cir. 1965) 10
State ex rel. Citizens Against Mandatory Bussing v. Brooks, 80 Wash. 2d 121, 492 P.2d 536 (1972) . . . 13
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 8,10
Sweatt v. Painter, 339 U.S. 629 (1950) 21

Tometz v. Board of Education, Waukegan City, 39 Ill. 2d 593, 237 N.E.2d 498 (1968) 10
T.V. 9, Inc. v. F.C.C., __F.2d__, 42 U.S.L.W. 2245 (Nov. 13, 1973) 11

United States v. Jefferson County Board of Education, 372 F.2d 836, 876-77 (5th Cir. 1966) . . . 9
United States v. Montgomery County Board of Education, 395 U.S. 225 (1969) 8

PAGE

University of Maryland v. Murray, 169 Md. 478, 182 A. 590 (1936) 21

Other Authorities:

Anderson, *The Admissions Process in Litigation*, 15 Ariz. L. Rev. 81 (1973) 16
Association of American Law Schools, *1973 Survey of Minority Group Students in Legal Education* (Dec. 1973) 21
Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 Toledo L. Rev. 539 . . . 17,21
P. Bergman, The Chronological History of the Negro in America, 221 (1969) 18
B. Bittker, The Case for Black Reparations 120 (1973) . . 8
Brown, *The Genesis of the Negro Lawyer in New England*, 22 The Negro Hist. Bull. 147, 148 (1958) 18
Carl and Callahan, *Negroes and the Law*, 17 J. Legal Ed. 250 (1965) 21
M. Davie, Negroes in American Society 115-16 (1949) . 19,20
Edwards, *The New Role for the Black Law Graduate: A Reality or an Illusion?* 69 Mich. L. Rev. 1407, 1432 (1971) 22
Gellhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1070, n. 13 20
J. Greenberg, Race Relations and American Law 260-69 (1959) 21
W. Grier and P. Cobbs, Black Rage (1968) 17
A. Haley, The Autobiography of Malcolm X, 36-37 (1964) 20
Hughes, *Reparations for Blacks?* 43 N.Y.L.J. 1063, 1072 (1968) 12
Kagan, *The IQ Puzzle: What Are We Measuring?* No. 14 Inequality in Education, 5 (Jul. 1973) 15

PAGE

A. Kardiner and L. Ovesey, The Mark of Oppression (1962) 16
J. Kovel, White Racism: A Psychohistory (1970) 16
Leonard, *The Development of the Black Bar,* 407 The Annals 134, 136 (May, 1973) 18, 19
McGee, *Black Lawyers and the Struggle for Racial Justice in the American Social Order,* 20 Buffalo L. Rev. 423 (1971) 20
Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions: DeFunis v. Odegaard,* 49 Wash. L. Rev. 1, 4-5, notes 14-15 22,23
Note, *Negro Members of the Alabama Bar,* 21 Ala. L. Rev. 309 (1969) 21
Note, *Race Quotas,* 8 Harv. Civ. Rights-Civ. Lib. L. Rev. 128 (1973) 9
Parker and Stebman, *Legal Education for Blacks,* 407 The Annals 144 (May 1973) 22
Ramsey, *Law School Admissions: Science, Art or Hunch?* 12 J. Legal Ed. 503, 517 (1960) 15
R. Rosenthal, L. Jacobson, Pygmalion in the Classroom (1968) 15
Schrader, Pitcher, *Predicting Law School Grades for Black American Law Students,* Law School Admission Council (Mar. 1973) 15
Shuman, *A Black Lawyer Study,* 16 Howard L.J. 304 (1971) 20
Stevens, *Two Cheers for 1870: The American Law School* in Law in American History, 405, 428, n.16 (D. Fleming and B. Bailyn eds. 1971) 19
United States v. Georgia, No. 30, 388 (5th Cir. 1971), *Amicus Curiae* brief for the National Educational Association at 920-21 14
Wechsler, *Toward Neutral Principles of Law,* 73 Harv. L. Rev. 1, 15, 31-34 (1959) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DeFUNIS, *et al.*,

Petitioners,

—v.—

CHARLES ODEGAARD, President of the University of Washington, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE NATIONAL CONFERENCE OF BLACK LAWYERS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

Interest of the Amicus

The National Conference of Black Lawyers (NCBL) is an incorporated association of approximately 500 black lawyers in the United States and Canada, and 2,500 law students affiliated with NCBL through their membership in the Black American Law Student Association (BALSA).

Since its inception in December of 1968, NCBL, through its national office, local chapters, co-operating attorneys and the BALSA organization, has (1) carried on a program of litigation, including defense of the politically unpopular and affirmative suits on community issues; (2) monitored governmental activity that affects the black community, including

judicial appointments, and the work of the legislative, executive, judicial and administrative branches of government; and (3) served the black bar through lawyer referral, job placement, continuing legal education programs, defense of advocates facing judicial and bar sanctions, and watchdog activity on law school admissions and curriculum.

The latter activity is of crucial importance. Despite the progress made as a result of law school programs such as that under attack here, the number of black and other minority-group lawyers remains seriously short of the need. The legal representation available to most black people remains either non-existent or inadequate.

For example, NCBL attorneys have been involved in the cases of black activist individuals and groups who, despite their racially-connected difficulties, were deemed ineligible for legal assistance by the nationally-recognized civil rights organizations. Offering them an alternative to "radical" lawyers, NCBL has provided technically sound, sympathetic representation to, *inter alia*, Angela Davis, Martin Sostre, H. Rap Brown, the Cornell Students, the Republic of New Africa, and the Attica Inmates.

Minority-group lawyers have a unique role to play not merely in representing activists, but in implementing the civil rights statutes and decisions gained during the past generation. The nation's law schools, after much thought and experimentation, have evolved sound programs designed to identify and train minority lawyers qualified to perform these tasks. NCBL joins the many groups who urge this Court that these programs are vitally necessary, educationally appropriate, and constitutionally sound.

Consent to Filing

This Amicus Curiae brief is filed with the written consent of counsel for the parties in this proceeding.

Opinions Below

The opinion of the trial court, Superior Court of the State of Washington, County of King, is not reported. The opinion of the Supreme Court of Washington is reported in 82 Wn. 2d 11, 507 P. 2d 1169.

Question Presented

Whether a state law school's admissions policy that takes cognizance of race to insure fair consideration of minority group applicants and remedy their past exclusion from the legal profession violates the Constitution where such policy is voluntarily adopted rather than judicially ordered to correct proven discriminatory practices.

Statement of the Case

Petitioner DeFunis is white. He sought and failed to gain admission to the respondent law school in both 1970 and 1971 (St. 13, 22). In the wake of his second rejection, he filed suit in state court alleging that the school's admissions policies discriminated against him by granting admission to veterans, nonresidents and members of disadvantaged minority groups, many of whom he alleged presented credentials and qualifications inferior to his own (App. 12-15).

The trial court, despite voluminous and uncontroverted testimony that the admissions procedure utilized by the respondent law school contained both quantifiable and non-quantifiable factors, concluded that entitlement to admission was equatable with mechanical credentials, *i.e.*, a numerical predictor of first-year performance obtained by a formula utilizing a portion of an applicant's undergraduate grades and the score obtained on a nationally-standardized Law School Admissions Test (LSAT). Interpreting *Brown v. Board of Education*, 347 U.S. 483 (1954), as a bar to any consideration of race, the lower court held that the admission of

minority students with lower prediction averages violated petitioner DeFunis's rights under the equal protection clause of the Fourteenth Amendment. The admission of veterans and non-residents, most of whom were white, and many of whom held prediction averages lower than petitioner's was, the lower court found, not based on race, and thus was "quite proper" (App. 57).

The respondent law school selected its 1971 first-year class, limited to 150 students, from a record-high total of 1,601 applicants (St. 334-35), at least half of whom could probably do "good work at the University of Washington." (St. 155). Balancing grades and test scores with evidence of "ability to make significant contributions to law school classes and to the community at large" (Ex. 45), the Admissions Committee sought to select a diverse range of talented male and female students from a variety of geographical, academic, social-class and racial backgrounds (St. 31, 218, 360-61).

The committee admitted most (St. 340) but not all applicants with a combined LSAT and grade-point prediction average above 77 (St. 343, 406), and rejected most but not all applicants with scores below 74.5 (St. 341-42). Applicants with averages between these two figures, including petitioner, were assumed capable of performing law school work, and were classified according to an evaluation of their transcripts and a review of non-numerical evidence of potential in letters of recommendation, the applicant's statement and record of achievement (St. 338-39). All minority applicants were similarly reviewed (St. 341-42, 399). Forty-four minority applicants were admitted, 18 of whom subsequently enrolled (App. 50). Six of those admitted had higher prediction averages than DeFunis (App. 52). Thirty-six had lower averages than did petitioner (App. 50), but so did 38 white admittees, including 22 returning from the military, and 16

deemed worthy of invitations based on other information in their files (Ex. 44). Of the 311 students admitted, 224 had higher prediction averages than petitioner (St. 366-67).

University of Washington President Odegaard testified that the special attention given minority-group applicants by the Admissions Committee accorded with a University-wide policy (St. 108-09, 416) adopted in 1963 when school officials realized that an "open door" at the point of entry to the University was not enough, in view of the cultural conditions and the separation of minority students from conventional backgrounds, to alter the virtually all-white composition of the University's student body (Tr. 223-24).

The President (St. 241-43), as well as law school officials (St. 163-64), consistently denied that giving increased weight to evidence obtained from the background of minority applicants with lower grade and test score credentials to ascertain motivation and the capacity to overcome previous disadvantages (St. 242) constituted a lowering of standards or qualifications. They pointed out that greater reliance could be placed on other criteria in evaluating minority applicants. For example, successful completion of the pre-law program sponsored by the Council on Legal Education Opportunity (CLEO) serves as a reliable predictor of law school performance (St. 90, 121-25).

University of Texas Law School Professor Millard Ruud, a consultant on legal education to the American Bar Association (St. 119-20), explained that the LSAT was "exceedingly important" as a predictor of law school performance, but he warned that it is not a "precise measure" like "an apothecary scale," and "no substitute for human judgment and evaluation." (St. 128). With minority students, he testified "that there is a greater need for exercise of judgment of looking at,

examining the transcript, examining all other data . . . ." (St. 129). An LSAT official supported Professor Ruud's statements, characterizing the LSAT as an interpretive rather than a precise predictive tool (St. 184), that alone will not provide an accurate indication of law school potential (St. 197-98).

Respondents uniformly maintained that they sought, not a racial quota (St. 353, 420), but a "reasonable representation" of minority-group students in the 1971 class (St. 416, 426-27). They asserted their aim was not to discriminate against petitioner DeFunis, but to further the University's goal of assisting historically suppressed and excluded minorities into the mainstream of society (St. 416), and improve the educational environment of the law school (St. 418). The special procedures given minority applications, adopted after the University's "open door" policy failed to produce results, were justified by President Odegaard because color-blind admissions function "to deprive segments of American society from opportunities that other segments of society have and that something more than a sanitized mechanical system is required to solve this problem in finding the true potential of individuals." (St. 243).

A majority of the Supreme Court of Washington concluded that the respondents' consideration of race in admitting students was necessary to the accomplishment of a compelling state interest.

Summary of Argument

Legislative and judicial declarations of racial equality do not automatically eradicate conditions and remedy deprivations that led to their promulgation. Meaningful implementation requires adoption, usually under a specific legal mandate, of color-conscious corrective policies designed to provide those excluded by race with the opportunity to compete on an equal basis for the places from which they were excluded.

But a state law school, cognizant of the historic exclusion of minority groups from he legal profession, may voluntarily adopt a modest affirmative action admissions program reasonably intended to ameliorate past exclusionary patterns without violating the rights of non-minority applicants whose chances for admission may be lessened by such programs.

ARGUMENT

The respondent law school's minority-admissions policy is a constitutionally appropriate effort to remedy the effects of long-standing racial discrimination in the legal profession.

The National Conference of Black Lawyers, along with black people generally, fervently hope that a time will come when all affirmative action admissions policies can, by the application of equal protection standards carefully developed by this Court, be held unconstitutional.

The central purpose of the Fourteenth Amendment was to eliminate official racial discrimination, and to realize that purpose, this Court has scrutinized with great care state-imposed racial classifications, deeming them "constitutionally suspect," . . . and subject to the "most rigid scrutiny" . . . *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). It is not clear that the Court intended to apply this standard to efforts clearly intended to redress racially discriminatory conditions as well as to those laws that subordinated blacks and other minorities on the basis of race. In any event, *amicus curiae* hope a time will come when black law school applicants will not have experienced racial discrimination in the form of, *inter alia*, inferior public schools and racially limited employment and housing opportunities. They will have overcome societal handicaps sufficiently to present grades and test scores in ranges indistinguishable from those offered by whites. The percentage of black law students in the schools and lawyers in the profession will then approximate the percentage of their white counterparts. At that time, blacks

will no longer need an affirmative action program, and its adoption by a law school might well be found unconstitutional.

Unfortunately, the minority applicants who applied for admission to respondents' law school in 1971 were not born in a racism-free society. A century after enactment of the Fourteenth Amendment, and a generation after *Brown v. Board of Education*, 347 U.S. 483 (1954), the transition from the status of slaves to the equality of opportunity enjoyed by white citizens is still underway. To assume, as the trial court did, that this Court's decisions enunciating the rights of blacks to racial equality requires no compensatory remediaton confuses signposts to a goal with the goal itself.

I. Some consideration of race is necessary to remedy disadvantages imposed because of race.

Resistance to desegregation plans, including charges that such plans discriminate against whites, have marked virtually every step taken to secure equality of opportunity to racial minorities. Courts have heard and generally rejected such charges, recognizing with one legal scholar "that we can have a color-blind society in the long run only if we refuse to be color-blind in the short run." B. BITTKER, THE CASE FOR BLACK REPARATIONS 120 (1973).

The facile doctrine that "The Constitution . . . does not require integration. It merely forbids discrimination." *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955), has been rejected in school desegregation cases. *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The use of culturally biased standardized tests and unvalidated employment qualifications,

despite their superficial appearance of fairness, have been characterized as "built-in headwinds" for minority groups in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Voting requirements have been struck down when their effect was to burden minorities handicapped by the effects of prior state-supported discrimination. *Gaston County v. United States*, 395 U.S. 285 (1969).

In each of these major decisions, the standard of effecting remedy is keyed to recognition of race, and lower courts, relying on these standards, have approved or ordered racial classifications to avoid or eliminate racial inequality. "Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required." *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920, 931-32 (2d Cir. 1968). See also, *United States v. Jefferson County Board of Education*, 372 F. 2d 836, 876-77 (5th Cir. 1966). Racial classifications, including racial percentages and quotas have been approved to correct racial discrimination in literally hundreds of civil rights cases. Note, *Race Quotas*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 128 (1973).

In the area of employment discrimination, *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir. 1971), is one of a series of cases requiring police and fire departments to hire one qualified minority person for every three whites until a certain percentage of minority persons has been hired, even if more qualified non-minority candidates must be bypassed. And in the "hometown plan" cases, *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159 (3d Cir. 1971), courts have required builders and construction unions to meet pre-set levels on minority hiring and training.

In school desegregation cases courts have followed the directions in *Swann, supra*, regarding racial percentages as tools to facilitate elimination of prior policies that discriminated on the basis of race. Indeed, state statutes attempting to bar assignment of students on a racial basis have been declared unconstitutional. *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971); *Lee v. Nyquist*, 318 F. Supp. 710 (W.D. N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

II. A judicial finding of racial discrimination is not a condition precedent to adoption of a valid minority admissions program.

In most school cases, proof that discrimination has occurred iis presented, but the authority to order affirmative relief is not conditioned on judicial findings of responsibility for the racial deprivation, but on the presence of the deprivation itself. It is on this basis that courts have upheld voluntary actions by school boards intended to correct racial imbalance against challenges by white parents and teachers. *Offermann v. Nitkowski*, 378 F. 2d 22 (2d Cir. 1967); *Porcelli v. Titus*, 431 F. 2d 1254 (3d Cir. 1970), and see several additional cases discussed in *Tometz v. Board of Education, Waukegan City*, 39 Ill. 2d 593, 237 N.E. 2d 498 (1968). Even courts that refused to order school desegregation without proof that the school board was responsible for the racially-isolated schools, suggested that the Constitution permitted voluntary desegregation plans. *Deal v. Cincinnati Board of Education*, 369 F. 2d 55, 61 (6th Cir. 1966); *Springfield School Comm. v. Barksdale*, 348 F. 2d 261, 266 (1st Cir. 1965).

Often, the deprivation intended to be eased by a racial classification is societal in scope, not specific or attributable to a single law or policy. The several laws and decisions concerning American Indians are an example. See *e.g., Sim-*

mons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd per curiam,* 384 U.S. 209 (1966), upholding a federal statute's racial classification which limited the rights of inheritance to the Yakima Indian allotments to descendents of "one-fourth or more blood" of the Yakima tribe. *Cf. Mancari v. Morton,* 359 F. Supp. 585 (D. N.Mex. 1973), where the court rules that a federal employment statute granting a perference to Indians must give way to the Equal Employment Opportunity Act of 1972, on a record reflecting the adverse effect on non-Indians, and no evidence to show any national-public purpose to be served by the preference statute.

Consider also *T.V. 9, Inc. v. F.C.C.,* __ F. 2d __, 42 U.S.L.W. 2245 (Nov. 13, 1973), in which the Ninth Circuit held that

> Color blindness in the protection of the rights of individuals under the laws does not foreclose consideration of stock ownership by members of a black minority where the commission is comparing the qualification of applicants for broadcasting rights . . . . Inconsistency with the Constitution is not to be found in a view of our developing national life which accords merit to black participation among principals of applicants for television rights. However elusive the public interest may be it has reality. 42 U.S.L.W. at 2246.

III. Respondents' minority admissions plan is not rendered invalid because it alters expectations rooted in societal patterns that perpetuate racial inequality.

In addition to urging the Court not to approve affirmative action plans unless they remedy past, specific racially discriminatory actions, *amici* briefs supporting petitioner

DeFunis argue that such plans may impose no new deprivation on other innocent parties such as petitioner. The position seeks to resurrect the proposition that it should be possible to remedy racial injustices against blacks without diluting the privileges and expectations which whites had hitherto enjoyed. Wechsler, *Toward Neutral Principles of Law*, 73 HARV. L. REV. 1, 15, 31-34 (1959). But whether intended or not, others did benefit from policies that excluded minorities. Thus, when corrective action is taken, the impact will be felt by those who enjoyed – however innocently – privileges and expectations which belonged to others. *Local 189, United Papermakers and Paperworkers, AFL-CIO v. United States*, 416 F. 2d 980 (5th Cir. 1969); Hughes, *Reparations for Blacks?* 43 N.Y.L.J. 1063, 1072 (1968).

To suggest as does petitioner that public school desegregation plans are distinguishable because, unlike the case at bar, no white student is actually excluded from school, demeans the sincere, if misguided, concern that motivates white parents to oppose these plans in court, and ignores the serious consideration courts have given to the resolution of the competing interests posed by such litigation. There is sacrifice involved in these cases as even the most committed integrationist must concede after studying Mr. Justice Powell's concurring and dissenting opinion in *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 217 (1973). Or read Judge Weick's strong dissent against the busing plan approved in *Northcross v. Board of Education of Memphis*, 466 F. 2d 890, 898 (6th Cir. 1972).

> It is not claimed that these unfortunate children, who are the victims of induced busing, have committed any offense. And we are living in a free society in which one of the privileges is the right of association.

> The average American couple who are raising their children, scrape and save money to buy a home in a nice residential neighborhood, near a public school. One can imagine their frustration when they find their plans have been destroyed by the judgment of a federal court.
>
> The elimination of neighborhood schools necessarily interferes with the interest in and participation by parents in the operation of the schools through parent-teachers' associations, interferes with activities of children out of school, and interferes with their privilege of association, and it deprives them of walk in schools. It can even lower the quality of education. 466 F. 2d at 898. See also, *Anderson v. San Francisco Unified School District,* 357 F. Supp. 248 (N.D. Cal. 1972).

The Washington Supreme Court is not unaware of the dislocations desegregation may cause. In approving a Seattle voluntary school desegregation plan, the court found the board could use race as a criterion whether the nature of the segregation was *de jure* or *de facto,* and that busing was within the authority of school officials despite awkwardness, inconvenience and other burdens. *State ex rel. Citizens Against Mandatory Bussing v. Brooks,* 80 Wash. 2d 121, 492 P. 2d 536 (1972).

Sacrifice incurred during the process of remedying racist conditions is not limited to whites. The loss suffered by black children during the long years required to give real meaning to *Brown I,* under the "all deliberate speed" standard of *Brown II,* is incalculable. Nor have the burdens of implementation been uniracial. Black students have lost community schools, *Allen v. Asheville City Board of Education,* 434 F. 2d 902 (4th Cir. 1970); *Norwalk CORE v. Norwalk Board of Education,* 423 F. 2d 121 (2d Cir. 1970), and black teachers

have lost their jobs, see *amicus curiae* brief for the National Educational Association, *United States v. Georgia*, No. 30, 388 (5th Cir. 1971) at 920-21. Some courts have gone to shocking lengths to further integration even at the expense of prior commitments to minority groups. Thus, in *Otero v. New York City Housing Authority*, — F. 2d —, 42 U.S.L.W. 2185 (Oct. 9, 1973), the Second Circuit held that the Authority could refuse to rent new housing to displaced minority-group residents where such rentals would create a "pocket ghetto" and violate its affirmative duty to integrate public housing.

The dislocations of desegregation programs suffered by blacks and whites are an unfortunate concommittant of social change. They are not equatable with nor do they herald a return to the restrictive quotas imposed on Jewish students by some colleges 50 years ago. Contrary arguments in the *amicus* brief supporting petitioner's Jurisdictional Statement filed by the Anti-Defamation League of B'nai B'rith at 24, reflect far less faith in this society's ability to equitably solve its racial problems than has been exhibited by those blacks and other minorities who, despite all, are still seeking opportunities for success and achievement now enjoyed by previously victimized religious and ethnic groups in this country. The fears that moderate plans of racial remediation will somehow escalate to levels that threaten legitimate interests because they expressly use race and not some disingenuous synonym like "cultural disadvantage," are unwarranted, given the moderate character of respondents' plan, which at 1971 enrollment levels will require many decades before the disparities in the number of minority lawyers in Washington state are substantially reduced.

Moreover, the voluntarily-adopted policy of respondents under review here is no less reasonable, appropriate and immune to charges of "reverse discrimination" or "racial

quota" than were the school plans set forth above. Despite the efforts by petitioner's counsel at trial, the Record shows that law school personnel followed the dictates of their experience and the instructions from LSAT officials, and considered the mechanical credentials, grades and LSAT scores, as important measures in determining qualifications, and not as the sole criteria for selection.[1] There were simply

[1] A law school would be, at least, remiss were it to rely heavily on standardized tests in gauging minority applicants' qualifications in view of the past use of tests in civil rights cases. Guinn v. United States, 238 U.S. 347 (1915); Schnell v. Davis, 336 U.S. 933 (1949); Alabama v. United States, 371 U.S. 37 (1962); Louisiana v. United States, 380 U.S. 145 (1965); Gaston County v. United States, 395 U.S. 285 (1969); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Baker v. Columbus Municipal Separate School District, 462 F. 2d 1112 (5th Cir. 1972); Chance v. Board of Examiners, 458 F. 2d 1167 (2d Cir. 1972).

Validation studies thus far undertaken to measure the accuracy of the LSAT for minority students indicate that it has value as a predictor, Schrader, Pitcher, *Predicting Law School Grades for Black American Law Students*, Law School Admission Council (Mar. 1973), but critics point out that such tests cannot measure attitude, motivation, ability to empathize, and other qualities needed in practice. Ramsey, *Law School Admissions: Science, Art or Hunch?* 12 J. LEGAL ED. 503, 517 (1960).

At best, they predict first year grades, not law school performance or professional competence. There is even basis to fear that the accuracy of first year predictions may be attributable in part to a self-fulfilling prophecy effect on the student and his teachers. R. ROSENTHAL, L. JACOBSON, PYGMALION IN THE CLASSROOM (1968); Kagan, *The IQ Puzzle: What Are We Measuring?* No. 14 INEQUALITY IN EDUCATION, 5 (Jul. 1973).

To the extent that standardized test scores are "culturally biased" in favor of white, middle class examinees, Hobson v. Hansen, 269 F. Supp. 401, 476-88 (D. D.C. 1967), over-reliance on LSAT scores would present barriers to minority applicants quite similar to the "alumni character recommendations" struck down in the college desegregation cases. Meredith v. Fair, 305 F. 2d 343, 351-354 (5th Cir. 1962); Hunt

too many white applicants admitted with lower mechanical scores than petitioner and too many whites who were denied despite higher scores to support his position that his rights were violated because of the admission of minority students with "lower qualifications."

The selection process is not a scientifically precise one, relying of necessity in some degree on intuition rather than engineering, but it is sufficiently within the standards for administrative agency action set in cases like *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), to earn judicial respect for its judgment and the reasonableness of its action, especially in an educational policy question. *San Antonio Independent School District v. Rodriquez*, 93 S. Ct. 1278, 1301-02 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970). See, Anderson, *The Admissions Process in Litigation*, 15 ARIZ. L. REV. 81 (1973).

Here, the respondents' affirmative action policy is correct as well as reasonable. While several of the minority applicants presented comparatively low mechanical credentials, they had completed the CLEO program or had other experiences or characteristics justifying a decision that they could perform law school work and contribute to their classes while in school, and to their communities after graduation. In measuring professional school potential of minority applicants, it is most appropriate to consider the disadvantages and handicaps that in varying degrees each of them, regardless of their socio-economic status, has had to overcome. These societal obstacles have been identified by social scientists, see, *e.g.* J. KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970); A. KARDINER AND L. OVESEY, THE MARK OF OPPRES-

v. Arnold, 172 F. Supp. 847 (N.D. Ga. 1959). *Cf.* Local 53, Intern. Assoc. of Heat and Frost Insulators, and Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969).

SION (1962); W. GRIER AND P. COBBS, BLACK RAGE (1968), and recognized by this Court. *Brown v. Board of Education, supra.*

The reasonableness of respondents' minority admissions program is not weakened by suggestions that it is patronizing to minorities. Indeed, such a characterization might more readily fit the respondents' refusal to adopt such a program since such refusal would imply that the absence of minority law students was due to shortcomings generic to the group rather than the deprivations of opportunity unfairly placed on them by society.

Minority students are not stigmatized by respondents' admission policies, although the adjustment difficulties may exceed those of their white classmates. Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 TOLEDO L. REV. 539. But the Constitution does not guarantee, nor do minority students seek, a "free ride" through law school. An opportunity for admission based on a fair range of prediction criteria is all they seek, and considering their past exclusion from the legal profession, the respondents' moderate program is, at least, constitutionally appropriate.

The Washington Supreme Court found the factors justifying respondents' minority admissions program constituted a compelling state interest. This characterization should not be disturbed even if the Court finds that the program is not required by federal law. *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* ___ F. 2d ___ , 42 U.S.L.W. 2320 (Dec. 25, 1973).

IV. The historic exclusion of racial minorities from the legal profession justified respondents' affirmative efforts to attract qualified minority applicants.

The Constitutional appropriateness of the respondent law school's minority admission policies need not be assumed. The dearth of black lawyers which respondent officials hope their admissions policies will help to alleviate, did not occur by chance. It is directly related to a pattern of systematic exclusion of blacks from the legal profession that dates back to *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). The finding in that decision that no blacks were citizens, whether slave or not, served as a barrier to blacks being admitted to practice, since virtually all the states required citizenship as a qualifying condition for admission to their bars.[2] By the Civil War in 1860, there were 4,441,830 blacks in the country, only 488,070 (11 percent) of whom were free,[3] but probably no more than eight black lawyers.[4]

The end of the Reconstruction period also marked the decline of the few black lawyers who had made some

---

[2] Brown, *The Genesis of the Negro Lawyer in New England*, 22 THE NEGRO HIST. BULL. 147, 148 (1958). Brown advises that Macon B. Allen, the nation's first black attorney, was denied admission on motion under Maine law which rendered any citizen eligible for admission who produced a certificate of good moral character. Allen was rejected on the ground that he was not a citizen. He was subsequently admitted in 1844 after satisfactory examination by a committee of the Bar.

[3] P. BERGMAN, THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA, 221 (1969).

[4] See Leonard, *The Development of the Black Bar*, 407 THE ANNALS, 134, 136 (May, 1973), and Brown, *supra*, note 2, Part I, 147-51, and Part II, at 171-77. Five black lawyers, Macon Allen, Robert Morris, Aaron Bradley, Edwin Walker, and John S. Rock, practiced in Massachusetts before the Civil War. John Mercer Langston became a member of the Ohio Bar in the 1850s, Garrison Draper joined the Maryland Bar in 1857, and Jonathan J. Wright was admitted to the Pennsylvania bar about this time.

advances in practice and politics.[5] As late as 1940, when the black population had grown to 12,866,000,[6] there were only about 1,063 black judges and lawyers, one professional for every 12,103 blacks.[7] Those blacks admitted to practice were excluded from the American Bar Association until 1943, when Judge James S. Watson of New York was elected.[8] Racial prejudice, combined with a continuing lack of educational and economic resources, served to curtail seriously the number of blacks who aspired to join the legal profession and limited the range of success and accomplishment for those

---

[5] See Leonard, *supra*, note 4, at 137.

[6] BERGMAN, *supra*, note 3, at 486.

[7] M. DAVIE, NEGROES IN AMERICAN SOCIETY, 116 (1949). The great majority of these lawyers were trained in black law schools. Howard University opened a law department in 1868. Eleven additional schools began in the decades that followed, but only one survived until 1921. Stevens, *Two Cheers For 1870: The American Law School*, in LAW IN AMERICAN HISTORY, 405, 428, n. 16 (D. Fleming and B. Bailyn eds. 1971).

Following this Court's decisions requiring desegregation of state law schools, *infra*, note 11, several black law schools were initiated. Today, in addition to Howard, the predominantly black schools are North Carolina Central Law School, in Durham, North Carolina, Southern Unviersity Law School in Baton Rouge, Louisiana, and Texas Southern University Law School in Houston, Texas.

[8] DAVIE, *supra*, at 118. Three blacks, whose racial identity was not known, were admitted into the ABA in 1912. The long exclusion of blacks by the ABA led black lawyers to form the National Bar Association in 1925. See also, Leonard, *supra*, note at 140-43.

who somehow overcame these multiple handicaps to law practice.[9]

Until recently, white law firms, government, business as well as bar associations were closed to black lawyers who, with some notable exceptions, operated on the fringe of the profession.[10] Except for the few predominantly black

---

[9] The court below cited a representative collection of published data and studies as evidence of the barriers facing blacks who aspired to a legal career. 507 P. 2d at 1182, n. 12. But it is simply not possible to gauge how many black youth have been exposed to experiences similar to the conversation with his high school teacher reported by Malcolm X. It was in the early 1940s in East Lansing, Michigan, and his English teacher, Mr. Ostrowski, who had given him good grades and taken an interest in him, asked him whether he was thinking about a career. Malcolm replied:

> 'Well, yes sir, I've been thinking I'd like to be a lawyer.' Lansing certainly had no Negro lawyers – or doctors either – in those days, to hold up an image I might have aspired to. All I really knew for certain was that a lawyer didn't wash dishes, as I was doing.
>
> Mr. Ostrowski looked surprised, I remember, he leaned back in his chair and clasped his hands behind his head. He kind of half-smiled and said, 'Malcolm, one of life's first needs is for you to be realistic. Don't misunderstand me, now. We all here like you, you know that. But you've got to be realistic about being a nigger. A lawyer – that's no realistic goal for a nigger. You need to think about something you *can* be. You're good with your hands – making things. Everybody admires your carpentry shop work. Why don't you plan on carpentry? People like you as a person – you'd get all kinds of work.' A. HALEY, THE AUTOBIOGRAPHY OF MALCOLM X, 36-37 (1964).

[10] Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L. J. 1070, n. 13. See also, M. DAVIE, NEGROES IN AMERICAN SOCIETY, 115-116 (1949); Shuman, *A Black Lawyer's Study*, 16 HOWARD L. J. 304 (1971); McGee, *Black Lawyers and the Struggle for Racial Justice in the American Social Order*, 20 BUFFALO L. REV.

schools, Southern law schools were completely closed to blacks until required to admit them by a series of court orders handed down over a 20-year period from the 1930s through the 1950s.[11] But even after the 1954 school desegregation decision, many Southern schools continued to refuse black applicants until the late 1960s.[12]

In the North, law schools were not formally closed to blacks, but few were admitted until the initiation of minority recruitment and admissions programs in the late 1960s. Due in part to these programs, there were 7,601 minority students in ABA approved law schools during the 1973-74 school year.[13] The 4,817 black students exceeds the estimated

423 (1971); Note, *Negro Members of the Alabama Bar*, 21 ALA. L. REV. 309 (1969); Carl and Callahan, *Negroes and the Law*, 17 J. LEGAL ED., 250 (1965).

The difficulties black lawyers have faced are pointed up by the observation of Judge Robert L. Carter, formerly NAACP General Counsel, who observed that the notable civil rights achievements of Charles Houston, Thurgood Marshall, William Hastie, Spottswood Robinson and Constance Baker Motley, and other black lawyers tends to obscure the fact that few blacks have enjoyed noteworthy success in any field of law, including that of civil rights. Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 TOLEDO L. REV. 539, 541.

[11] Compare the evasive tactics employed in University of Maryland v. Murray, 169 Md. 478, 182 A. 590 (1936), with those used 20 years later in Florida ex rel. Hawkins v. Board of Control, 350 U.S. 413 (1956). In the interval, this Court had spoken clearly on the subject of segregated law schools in Sweatt v. Painter, 339 U.S. 629 (1950), Sipeul v. Bd. of Regents of Univ. of Oklahoma, 332 U.S. 631 (1948), and Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). The higher education litigation is discussed generally in J. GREENBERG, RACE RELATIONS AND AMERICAN LAW, 260-69 (1959).

[12] Gellhorn, *supra*, note 9, at 1070.

[13] 1973 Survey of Minority Group Students in Legal Education, Association of American Law Schools (Dec. 1973).

4,000 black practitioners by a sizeable number,[14] and probably the 2,784 other minority students far exceeds the number of lawyers who belong to these groups.[15]

But expressions of satisfaction over this undoubted progress are muted by a review of comparable white statistics. The 7,601 minority-group students represent only seven percent of the 106,102 students in law schools during the 1973-74 school year. The estimated 4,000 black lawyers represent little more than one percent of the nation's 300,000 lawyers.

There is a white attorney for every 631 whites in the country. While according to the U.S. Census, there were more than 22 million blacks in 1970, this averages out to only one black attorney for every 5,500 blacks. The figure would probably be far worse if other minorities were considered, and if the number of minority law graduates not working in law-related jobs were excluded.

Available data on minority attorneys in the State of Washington reflect the national pattern. In 1970, there were 4,550 active lawyers in the State. There was a white lawyer for every 720 whites in the State, but only 20 black lawyers

---

[14] See Edwards, *The New Role for the Black Law Graduate: A Reality or an Illusion?* 69 MICH. L. REV. 1407, 1432 (1971). Professor Edwards' study of hiring patterns in large mid-western law firms revealed that racial restrictions remain quite visible.

Employment concerns are not the only special problems confronting minority students. See, Parker and Stebman, *Legal Education for Blacks*, 407 THE ANNALS, 144 (May 1973).

[15] Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions: DeFunis v. Odegaard*, 49 WASH. L. REV. 1, 4-5, notes 14-15 (1973).

in all (three of these were judges), five Indian lawyers, and not one Mexican-American lawyer, despite the 70,734 Mexican-Americans in Washington.[16]

The minority groups considered in the respondent law school's minority admissions program (blacks, Indians, Mexican-Americans, and Filipinos) total about 186,890 or 6.2 percent of the population. Excluding the black judges, there are only 22 minority lawyers in the State, or one minority lawyer for every 8,495 minority persons.

The use of statistical disparities to illustrate the exclusion of minorities from the legal profession is not intended to suggest that all minority people want or should be required to use lawyers of their particular group. They certainly should not be interpreted to diminish the valuable service rendered to the cause of racial equality by white attorneys. What black people are entitled to in selecting lawyers is a choice not arbitrarily limited because of state-sanctioned racial exclusion.

The Washington Supreme Court concluded from the available data that minorities are "grossly underrepresented in the law schools – and consequently in the legal profession – of this state and this nation." *DeFunis v. Odegaard*, 82 Wn. 2d 11, 32-33, 507 P. 2d 1169, 1182 (1973).

Based on the disparities reflected in these statistics, one commentator has gone further, suggesting that "While the state voluntarily undertook to provide a corrective program of law school admission it may actually have been under a constitutional duty to have done so." [17] Certainly a state law

[16] *Id.* at 37-38.

[17] *Id.* at 39.

school, faced with the significance of statistics such as those in this case, is not bound to wait for a court to mandate action based on the Constitution before adopting policies that will both comply with its words and honor its spirit.

Indeed, it is the adoption of precisely such policies that keeps alive the dream that this society may someday outgrow the need to protect its minority members against discrimination based on race, color, or creed.

For all the foregoing reasons, *amicus curiae* urge this Court to affirm the judgment of the Supreme Court of Washington.

Respectfully submitted,

DERRICK A. BELL, JR.
Harvard Law School
Cambridge, Mass. 02138
Attorney for Amicus Curiae

Of Counsel:
LENNOX S. HINDS
National Director,
National Conference
of Black Lawyers
126 West 119th Street
New York, N.Y. 10027

HAYWOOD BURNS
University of New York at Buffalo
School of Law
Buffalo, N.Y. 14202